OUTGOING AIRGRAM

DEPARTMENT OF STATE DIVISION OF COMMUNICATIONS AND RECORDS TELEGRAPH BRANCH

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DEPARTMENT OF STATE
OFFICE OF THE LEGAL ADVISER
JUL 23 1952
TREATY BRANCH

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AMEMBASSY,

TOKYO

A-49, July 23, 1952

SUBJECT: FCN Treaty. Interpretation of Certain Provisions Embassy Despatch 269, June 19, 1952.

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There follow comments on the specific questions raised in reference Despatch:

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a. The analysis of this question begins with the second sentence of Article XXII, Paragraph 3, which establishes that whether or not a juridical entity is a "company" of either Party, for treaty purposes, is determined solely by the place of incorporation. Such factors as location of the principal place of business or the nationality of the majority stockholders are disregarded. Under such a simple test, however, nationals of third countries could indirectly but effectively secure valuable treaty rights through taking advantage of liberal corporation laws. Thus to take a hypothetical example, citizens of country Z which had refused to make a reciprocity treaty with Japan, and which was even on bad relations with Japan, might, nevertheless, enjoy unilaterally many business advantages in Japan, ordinarily accruing only to friendly treaty nations, by the device of setting up and operating through a Delaware corporation. The purpose of Paragraph 1(e) of Article XXII is to leave each party free to protect itself against such an eventuality, as it might wish, by allowing it to "pierce the corporate veil" of companies chartered under the laws of the other Party, for most treaty purposes.

The rule of Article XXII, Paragraph 1(e) has to do with the treatment one party is obligated to accord to "companies" of the other party, such companies being as defined in Article XXII(3). The rule of the second sentence of Article VI, Paragraph 5, on the other hand, relates to "enterprises" in which such companies (or nationals) have a substantial interest. The word "enterprises" is not a synonym for "companies"; it is a much broader term, having to do with a business undertaking or establishment in the large and popular sense, regardless of juridical

form,

form, nationality, etc.

The rule of paragraph 1(e), Article XXI, has bearing on the second sentence of Article VI(5) only to the extent that the word "companies" is used therein. If an American-chartered company had a substantial interest in an enterprise in Japan, the Japanese Government would be obligated to give the treatment specified if such company were in fact American controlled, but not if such a company were controlled by nationals of third countries. The question of who controls the company is quite distinct from the question of who has what interest in the "enterprise" itself.

Thus the Japanese supposition that there is conflict between the provisions of VI(5) and XXI(1) (e) is not well grounded.

b. Article XX(1)(a) provides that Japanese nationals and companies shall have rights with respect to acquiring, using, and occupying land, structures, and other realty appropriate to the conduct of any activity in which they are entitled to engage pursuant to Article VII. The last sentence of Article VII(2) clearly provides for establishing and maintaining branches and agencies for the conduct of international transportation activity, which in the Department's intent covers international shipping. In order to make the last point clear, however, the Department authorizes the insertion of the words "shipping or other" before the word "transportation". Insofar, therefore, as tenure rights to wharves, warehouses, and other installations are reasonably necessary to the effective conduct of an international shipping operation, such rights are assured by Article XX(1)(a). Precisely what tenure rights may be reasonably necessary to the effective conduct of such an operation in a particular case, cannot, of course, be determined in vacuo; but the Department does not believe it is necessary to attempt to write more categorical language into the treaty on this point.

It should be further noted that Article XIII(3) provides for non-discrimination as to the access of vessels to ports, and to port and shipping facilities, insofar as such access is afforded to any international shipping on an other than tenure basis.

The right to enjoy the use of all appropriate facilities thus appears to be amply covered, without any further modification.

c. In analyzing the question here presented, it is necessary to distinguish between the ship operator, on the one hand, and the ship builder on the other. The ship operator engages in an establishment activity reserved from the treaty (Article VII(2), first sentence). Thus each party, so long as it does not violate some other provision of the treaty, retains full freedom to subsidize its own citizen-owned, national shipping, without being obliged to extend such subsidies to shipping owned by nationals of the other party.

The "citizens" referred to in 46 USC 1151 are ship operators. The construction subsidy is granted upon application of the ship operator, and on his behalf. The law does not specify that the ship builder, who is ultimately awarded the construction contract, be a citizen. The law speaks only of a "shipyard within the continental limits of the United States" (Sec. 1155) without reference to the nationalities of the owners of the shipyard. By contrast, the citizenship of the ship operator is repeatedly mentioned; and the avowed objective of the act (Sec. 1101) is to foster a citizen-owned merchant marine (not citizen-owned shipyard). As to the precise question of how this law is "interpreted", the Department is unaware that there has been occasion to interpret it on this specific point, or that any problem has ever arisen over it. The Department does not have the function of interpreting such laws; it can only point out that the law, contrary to the Japanese reading of it, does not provide that ship-building subsidies be restricted to American citizens.

The Department understands that the Embassy would like also two other points to be clarified, as follows:

1. As to the right of non-resident recipients of benefits under Article IV to convert yen payments into dollars. This Article provides national treatment. This means that insofar as this Article is concerned, the American non-resident beneficiary has a treaty right to exchange convertibility only to the extent that a Japanese non-resident would enjoy this privilege under Japanese law and regulation.

Further than this, however, it may be noted that the non-resident American would have such rights as are provided in Article XII; that is, no restrictions on convertibility except as may be allowed by the second paragraph of that Article, and, in situations where restrictions are necessary and allowable, he would enjoy such advantages as may be afforded by the phrase "giving consideration to special needs for other transactions" in Paragraph 3 and by the "no arbitrary discrimination" precept of paragraph 4.

2. As to the precise meaning of the terms "trade names" and "trade labels" in Article I -- the Department would have only the following observation to add to the Embassy's previous report of its explanation: These terms are merely by way of illustrating, along with "patents" and "trade-marks", the more common types of industrial property. The phrase "industrial property of every kind" is all-inclusive. It is thus unnecessary to have, in connection with the twenty, highly refined and precise definitions of the concepts "marks", "names" and "labels". It would indeed be quite permissible for Japanese and American law to differ substantially from each other in this and other industrial property matters. The Article's purpose is to provide national treatment with respect to whatever the laws of the country happen to provide with respect to recognizing and protecting industrial property; and the Japanese may make a free translation of secondary technical terms if translation proves to be difficult.

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